Supreme Court, U.S.
FILED

02 398 JUL 15 2002

OFFICE OF THE CLERK

No. _____

In the

Supreme Court of the United States

ARTEMIO CORTEZ-OCHOA,

Petitioner,

v.

CHERYL PLILER, Warden, Sacramento State Prison,
and PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Robert Joseph Beles Bar no. 41993
Paul McCarthy Bar No. 139497
1 Kaiser Plaza, Suite 1750
Oakland, California 94612-3688
Tel. No. (510) 836-0100
Fax No. (510) 836-0100

Counsel for Petitioner

50 pp

QUESTIONS PRESENTED FOR REVIEW

1. Were petitioner's rights to due process of law, conviction only upon proof beyond a reasonable doubt, and trial by jury, as guaranteed to him by the Fifth and Sixth Amendments to the United States Constitution, violated when the state trial court failed to instruct the jury that a showing of unreasonable self defense could reduce second degree murder to voluntary manslaughter?

2. Assuming the trial court did not have a *sua sponte* duty to correctly instruct the jury on the elements of second degree murder, voluntary manslaughter, and the defense of unreasonable self defense, was trial counsel prejudicially ineffective for failing to request such an instruction?

3. Was the failure to instruct harmless error?

LIST OF ALL PARTIES

Petitioner

Artemio Cortez-Ochoa, an individual.

Respondents

Cheryl Pliler, the Warden of the Sacramento State Prison.

People of the State of California.

TABLE OF CONTENTS AND TABLE OF AUTHORITIES

Table of Contents

section *page number*

QUESTIONS PRESENTED FOR REVIEW i

LIST OF ALL PARTIES ii

TABLE OF CONTENTS AND TABLE OF AUTHORITIES iii

PETITION FOR WRIT OF CERTIORARI 1

BASIS FOR JURISDICTION IN THE SUPREME COURT 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 1

STATEMENT OF THE CASE, INCLUDING BASIS OF JURISDICTION IN FEDERAL COURT 3

1. Basis of jurisdiction in federal court 3

2. Statement of the Case 3

a. Proceedings in the State Courts 3

b. Proceedings in the lower Federal Courts 3

c. Evidence presented at trial concerning the crime. 4

d. Instructions to the jury 5

ARGUMENT 8

1. The trial court's failure to instruct the jury on an essential element of the second degree murder charge violated petitioner's Federal rights to due process and trial by jury. 8

a. Introduction 8

b. The trial court erroneously instructed the jury that imperfect self defense only reduces murder to voluntary manslaughter if petitioner had an intent to kill. 11

c. The erroneous instruction violated petitioner's rights under the Fifth and Sixth Amendments to the United States Constitution. 12

d. The trial court had a *sua sponte* duty to to instruct that imperfect self-defense could negate implied malice, reducing second degree murder to manslaughter. 14

2. Assuming the trial court did not have a *sua sponte* duty to give a correct voluntary manslaughter instruction, trial counsel was prejudicially ineffective for failing to request such an instruction. 14

3. The instructional error was not harmless 15

Appendix A a-1
Ninth Circuit Memorandum Opinion

Appendix B a-5
District Court Judgment

Appendix C a-6
District Court Order Denying Petition for Writ of Habeas Corpus

Table of Authorities

cases *page number*

Bashor v. Risley, 730 F.2d 1228 (9th Cir. 1984) 10

Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) 9

Bennett v. Scroggy, 793 F.2d 772 (6th Cir. 1986) 10

Burks v. United States, 437 U.S. 15, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) 15

Cabana v. Bullock, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986) 10

Carella v. California, 491 U.S. 263, 109 S.Ct. 2419, 105 L.Ed.2d 218 (1989) 13

Cole v. Young, 817 F.2d 412 (7th Cir. 1987) 9

Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985) 10

Griffin v. United States, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991) 15

In re Christian S. (1994) 7 Cal.4th 768, 30 Cal.Rptr.2d 33, 872 P.2d 574 15

Keating v. Hood, 191 F.3d 1053 (9th Cir. 1999) 9, 13, 15

Keeble v. United States, 412 U.S. 205, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973) 10

Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) 9, 10, 12

Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) 9, 15

Osborne v. Ohio, 495 U.S. 103, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990) 9

Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977) 13

People v. Blakeley 23 Cal.4th 829, 6 Cal.Rptr.2d 451, 999 P.2d 675 (2000) 11

People v. Castillo (1997) 16 Cal.4th 1009, 68 Cal.Rptr.2d 451, 999 P.2d 1197 14

People v. Coddington (2000) 23 Cal.4th 529, 97 Cal.Rptr.2d 528, 2 P.3d 1081 14

People v. Lasko (2000) 23 Cal.4th 101, 96 Cal.Rptr.2d 441, 999 P.2d 666 11

Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) 10, 13, 15

Strickland v. Washington, 466 U.S. 668, 104 S.Ct.2052, 80 L.Ed.2d 674 (1984) 15

Stromberg v. California, 28 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931) 15

Suniga v. Bunnell, 998 F.2d 664 (9th Cir. 1993) 15

United States v. Fuchs, 218 F.3d 957 (9th Cir. 1999) 14

United States v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995) 8, 9, 13, 14

United States v. Gracidas-Ulibarry, 231 F.3d 1188 (9th Cir. 2000) 15

United States v. Hernandez-Franco, 189 F.3d 1151 (9th Cir. 1999) 13

United States v. Mendoza., 11 F.3d 126 (9th Cir. 1993) 13

United States v. Restrepo, 946 F.2d 654 (9th Cir. 1991) 12

Vujosevic v. Rafferty, 844 F.2d 1023 (3rd Cir. 1988) 10

Walker v. Endell, 850 F.2d 470 (9th Cir. 1987) 13

Yates v. United States, 354 U.S. 298, 77 S.Ct. 1064,
1 L.Ed.2d 1356 (1957) 15

statutes *page number*

28 U.S.C. 1254 1

28 U.S.C. section 2254. 3

Amendment V, United States Constitution 1

Amendment VI, United States Constitution 2

California Penal Code section 417 8

California Penal Code, section 187 ..... 2, 3

California Penal Code, section 188 2

California Penal Code, section 189. 2

California Penal Code, section 192. ..... 2, 6, 11

PETITION FOR WRIT OF CERTIORARI

Petitioner Artemio Cortez-Ochoa respectfully petitions for a writ of certiorari, to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered April 22, 2002.

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS OR ADMINISTRATIVE AGENCIES.

The opinions are unpublished. A copy of the opinion is attached as an appendix.

BASIS FOR JURISDICTION IN THE SUPREME COURT

1. Date of entry of order sought to be reviewed: April 22, 2002.

2. Date of any order respecting rehearing: none.

3. Statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question: 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment V, United States Constitution: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI, United States Constitution: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

California Penal Code, section 187: (a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought....

California Penal Code, section 188: Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

When it is shown that the killing resulted from the intentional doing of an act with express or implied malice as defined above, no other mental state need be shown to establish the mental state of malice aforethought...

California Penal Code, section 189. All murder which is perpetrated by means of ... any other kind of willful, deliberate, and premeditated killing ... is murder of the first degree. All other kinds of murders are of the second degree....

California Penal Code, section 192. Manslaughter is the unlawful killing of a human being without malice. It is of three kinds:

(a) Voluntary--upon a sudden quarrel or heat of passion.

(b) Involuntary--in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. ...

STATEMENT OF THE CASE, INCLUDING BASIS OF JURISDICTION IN FEDERAL COURT

1. Basis of jurisdiction in federal court

The basis for jurisdiction in the federal court in the first instance was 28 U.S.C. section 2254.

2. Statement of the Case

a. Proceedings in the State Courts

By an Information filed November 8, 1996, petitioner was charged with the murder (Penal Code section 187, subd. (a)) of Augustine Arroyo on or about October 6, 1995.

On February 6, 1998, the jury returned its verdict, finding petitioner not guilty of first degree murder, but guilty of second degree murder.

On August 27, 1997, the trial court sentenced petitioner to an aggregate term of 25 years to life

Petitioner filed a timely notice of appeal on March 26, 1998. The court of appeals affirmed the appeal. Petitioner then filed a timely petition for review. The California Supreme Court denied the petition for review on December 1, 1999.

b. Proceedings in the lower Federal Courts

Petitioner filed his federal habeas corpus petition on November 30, 2000. After briefing, the district court denied the petition on the merits.

Petitioner timely appealed to the United States Court of Appeals for the Ninth Circuit, which, after briefing, affirmed the district court's decision.

c. Evidence presented at trial concerning the crime.

On the afternoon of October 6, 1995, a young Latino man, Juan Barrera, was driving his white Monte Carlo Grand Prix on East 14th Street in Oakland. His brother, Rafael Barrera, was beside him in the front seat. Both young men were recent immigrants from El Salvador. Rafael Barrera was a member of the Barrio Latino Brothers, a Latino street gang a affiliated with the "Border Brothers." Juan Barrera was not a gang member but he associated with members affiliated with the "Border Brothers."

At that time, two rival gangs commanded the allegiance of Latino street gangs in Oakland. One, called "Border Brothers,"was made up of Latino immigrants, born south of the border. The other, called "Norteños", was made up of Latino youth born in the United States. Members of Latino neighborhood street gangs owing allegiance to Border Brothers on the one hand, and Norteños on the other, were enemies

While the car containing the Barrera brothers was stopped at a light, a brown Cadillac containing two Norteños pulled up beside them. One of the Norteños got out of the Cadillac, came over to Juan Barrera's window, told him he looked like "Puppet from the 94th Avenue gang" and punched him in the face. The Norteño then got back in the Cadillac, and rode away.

Petitioner was standing at a nearby bus stop watching the events unfold. Petitioner was a member of the Border Brothers, and he knew Juan and Rafael Barrera. Petitioner ran over to their car, and then rode with them as they pursued the Cadillac. When the Cadillac eluded them, they decided to pick up some friends also associated with the Border Brothers and continue to look for the Cadillac.

Petitioner and the Barreras picked up two more Border Brothers, Mario Rodas and someone identified only as "Chaco." They were joined by a second carload of about five additional Border Brothers, riding in a two-door beige Chevrolet. Petitioner picked up two guns, and gave one of the guns to the people in the second car.

The two carloads of Border Brothers then drove around Oakland, continuing to look for the brown Cadillac.

Shortly before 9:00 p.m. they reached 37th Avenue near East 14th Street. At the time, that area was mostly Norteño territory. The white Monte Carlo, driven by Juan Barrera, with petitioner in the right front seat, was in the lead. The car passed three young men, Robert Nava, Alexander Aguilar, and Manuel Carrasco, who were walking along the sidewalk. Aguilar and Carrasco, were gang members associated with the Norteños. The second "Border Brothers"car, the beige Chevrolet, was right behind the Monte Carlo. The Chevrolet stopped, and the occupants yelled gang insults. The Chevrolet turned around and the three young men started to run toward the nearby BART station for safety. The Monte Carlo also turned around, and followed the Chevrolet.

Meanwhile, another group of young men, including Augustine Arroyo, Gabriel Lugo, Alan Mendez, and Leo Elias, were watching from the stairs near Elias's house across the street on 37th Avenue. They were affiliated with the Norteños. While the others attempted to seek shelter inside Elias's house, Arroyo and Lugo went out into the street to see what was going on. The occupants of the Monte Carlo yelled gang insults at Arroyo and Lugo. As the Monte Carlo passed by, Arroyo approached to within about 18 feet of the car, threw up his hands, and said "what's up?" as -a challenge. Petitioner pulled out his gun and fired a single shot out the car window. The bullet struck Arroyo in the cheek, killing him. When police arrived, they found that Arroyo had a folding knife in his hand.

Petitioner was 16-years-old at the time of the shooting.

d. Instructions to the jury

The trial court provided instructions for the crimes of first and second degree murder, voluntary manslaughter, and involuntary manslaughter. The court instructed the jury that "in voluntary manslaughter, you have to have an intent to kill." The court defined

voluntary manslaughter as follows:

> "Every person who unlawfully kills another human being without malice aforethought but with an intent to kill is guilty of voluntary manslaughter in violation of Penal Code section 192(a).
>
> There is no malice aforethought if the killing occurred upon a sudden quarrel or heat of passion or in the actual but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury.
>
> That's called an imperfect self-defense, and I'll explain that to you later on.
>
> In order to prove this crime, each of the following elements must be proved:
>
> One, a human being was killed; Two, the killing was unlawful, and; Three, the killing was done with the intent to kiil.
>
> A killing is unlawful if it was not justifiable."

The trial court instructed the jury concerning imperfect self defense as follows:

> "A person who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury kills unlawfully but does not harbor malice aforethought and is not guilty of murder. This would be so even though a reasonable person in the same situation, seeing and knowing the same facts, would not have had the same belief. Such an actual but unreasonable belief is not a defense to the crime of voluntary or involuntary manslaughter.
>
> As used in this instruction, an imminent peril or

danger means one that is apparent, present, immediate, and must be instantly dealt with or must so appear at the time to the slayer.

However, this principle is not available, and malice aforethought is not negated, if the defendant by his unlawful or wrongful conduct created the circumstances which legally justified his adversary's use of force, attack, or pursuit."

The court also gave the jury instructions for second degree implied malice murder and involuntary manslaughter:

"Murder of the second degree is the unlawful killing of a human being when the killing resulted from an intentional act, the natural consequences of the act are dangerous to human life, and the act was deliberately performed with knowledge of the danger to, and with conscious disregard for human life.

When the killing is the direct result of such an act, it is not necessary to prove that the defendant intended that the act would result in the death of a human being."

"Every person who unlawfully kills a human being without malice aforethought and without an intent to kill is guilty of the crime of involuntary manslaughter in violation of Penal Code section 192 subdivision (b).

A killing is unlawful within the meaning of this instruction if it occurred: One, during the commission of an unlawful -unlawful act not amounting to a felony which is dangerous to human life under the circumstances of its commission.

An unlawful act not amounting to a felony

consists of a violation of Penal Code section 417, which I will define shortly.

The commission of an unlawful act, without due caution and circumspection, would necessarily be an act that was dangerous to human life in its commission.

In order to prove this crime, each of the following elements must be proved:

One, a human being was killed; and Two, the killing was unlawful."

ARGUMENT

1. The trial court's failure to instruct the jury on an essential element of the second degree murder charge violated petitioner's Federal rights to due process and trial by jury.

a. Introduction.

The trial court's failure to instruct on an essential element of the second degree murder and manslaughter charges deprived petitioner of his constitutional right to have the jury determine every material issue presented by the evidence.

The Fifth Amendment guarantee of due process and the Sixth Amendment guarantee of trial by jury, as applied to the states through the Fourteenth Amendment, "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 522-523, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). Under California law, malice is a necessary element of murder. Malice requires a showing of an intent to kill or the intent to do a dangerous act with conscious disregard of its danger. However, since either a showing of "heat of passion" or "imperfect self defense" will negate malice, malice necessarily requires proving

the absence of these factors. *Mullaney v. Wilbur*, 421 U.S. 684, 704, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975).

The state court instructed the jury on the lesser included offense of voluntary manslaughter. However, by erroneously instructing the jury that voluntary manslaughter requires a finding of intent to kill, the court prevented the jury from considering the defense theory of imperfect self-defense, and relieved the prosecution of its burden of disproving beyond a reasonable doubt the existence of any malice-negating factor.

In *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), the Supreme Court held that it was a violation of due process for the trial court not to give a lesser included offense instruction in a capital case. *Beck* has not been extended to non-capital cases, but even if it is constitutionally permissible for a state court to give no instruction at all on a lesser included offense, once the court undertakes to instruct, it must do so accurately, giving an instruction that sets forth all of the elements of the offense.

> "'Every federal court to consider the question since the Court decided *In re Winship* [397 U.S. 358, 370, 90 S.Ct. 1068, 1076, 25 L.Ed.2d 368 (1970)]... has agreed that a conviction procured without any jury instruction on an essential element of the offense is constitutionally invalid.'"

Keating v. Hood,191 F.3d 1053 at 1061 (9th Cir. 1999), quoting *Cole v. Young*, 817 F.2d 412, 424 (7th Cir. 1987) and citing *Osborne v. Ohio*, 495 U.S. 103, 122-24 & n. 17, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990). See also *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 18272 144 L.Ed.2d 35 (1999) (omission of element in instructions is constitutional error analyzed under the harmless error standard), *United States v. Gaudin* at 511 (due process "require [s] criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is

charged, beyond a reasonable doubt"), *Cabana v. Bullock*, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986).

Moreover, the omission is not merely of an element of the lesser offense voluntary manslaughter, but of murder as well. Malice is a necessary element of murder; the absence of malice is a necessary element of manslaughter. Since either a showing of "heat of passion" or "imperfect self defense" will negate malice, malice necessarily requires proving the absence of these factors. *Mullaney v. Wilbur*, 684 U.S. at 704.

The Court of Appeals held that the trial court's error was harmless, since it had the effect of telling the jury that if petitioner shot the victim without an intent to kill but in the unreasonable belief of the need to defend himself, he could be convicted only of involuntary manslaughter. However, a jury could only arrive at that interpretation by ignoring the court's narrow instruction on involuntary manslaughter. Contradictory instructions on elements of a crime have the same problem as instructions omitting elements of a crime. See *Sandstrom v. Montana* (1979) 442 U.S. 510, 519, 99 S.Ct. 2450, 61 L.Ed.2d 39, 48 (although "presumed-intent" instruction could have been construed as merely rebuttable rather than conclusive, the court ruled the instruction constitutionally defective because a reasonable juror could have believed that the issue of intent was conclusively established by reason of the instruction), *Francis v. Franklin*,471 U.S. 307, 322, 105 S.Ct. 1965, 85 L.Ed.2d 344, 358 (1985), ("language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity.")

The trial court's instructional error violated petitioner's right to due process of law. *Bashor v. Risley,* 730 F.2d 1228, 1240 (9th Cir. 1984); *Vujosevic v. Rafferty,* 844 F.2d 1023, 1027-1028 (3rd Cir. 1988); *Bennett v. Scroggy*, 793 F.2d 772, 778, fn. 13 (6th Cir. 1986); *Keeble v. United States* 412 U.S. 205, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973).

b. The trial court erroneously instructed the jury that imperfect self defense only reduces murder to voluntary manslaughter if petitioner had an intent to kill.

The trial court instructed the jury that "in voluntary manslaughter, you have to have an intent to kill." The court defined voluntary manslaughter as follows:

> "Every person who unlawfully kills another human being without malice aforethought but with an intent to kill is guilty of voluntary manslaughter in violation of Penal Code section 192(a).

It was error for the court to require that the jury find an intent to kill to return a verdict of voluntary manslaughter. Under California law, imperfect self-defense can negate either express or implied malice. Where a defendant kills with the honest but unreasonable belief that his life is in danger and acts with conscious disregard for human life, he is guilty of voluntary manslaughter in the same manner as if he had acted with intent to kill. *People v. Lasko* (2000) 23 Cal.4th 101, 96 Cal.Rptr.2d 441; 999 P.2d 666, *People v. Blakeley,* 23 Cal.4th 829, 6 Cal.Rptr.2d 451, 999 P.2d 675 (2000).

Lasko and *Blakeley* were decided on June 2, 2000, after the California Supreme Court had denied petitioner's petition for review, In *Lasko*, the Court held that it was error for a trial court to instruct the jury that intent to kill was a necessary element of voluntary manslaughter. In the companion case of *Blakeley*, the court specifically held that a finding of imperfect self-defense would reduce a second degree murder to voluntary manslaughter even if the defendant had not intended to kill. In so holding, the Supreme Court recognized that it had been settled law in California that a finding of imperfect self defense would negate the malice necessary to support a murder

conviction. *Blakeley* at p. 88.[1]

This is not unique to California, but is typical of murder statutes in the United States. In *Mullaney v. Wilbur*, the Court considered a Maine statute that required a defendant who otherwise might be convicted of murder to prove that he acted in the heat of passion on sudden provocation in order to avoid a murder conviction and, instead, be convicted of manslaughter.

> "The Court pointed out that almost from the inception of the common law, the presence or absence of heat of passion has been the single most important factor in determining a homicide defendant's degree of culpability. *Mullaney, id.* at 696, 95 S.Ct. at 1888. The Court also emphasized the significant difference in the stigma and sentences associated with murder and manslaughter and held that, consequently, due process requires the prosecution to prove at trial absence of heat of passion beyond a reasonable doubt. *Id.* at 698-700, 703-04, 95 S.Ct. at 1889-90, 1892."

United States v. Restrepo, 946 F.2d 654 at 660 (9th Cir. 1991).

c. The erroneous instruction violated petitioner's rights under the Fifth and Sixth Amendments to the United States Constitution.

> "Due process 'require[s] criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." . Therefore, an instruction that relieves the state of the burden of

[1] The Court of Appeals treated these decisions as if they stated new law. They did not; they merely clarified existing law.

> proving mens rea beyond a reasonable doubt contradicts the presumption of innocence and invades the function of the jury, thereby violating due process."

Keating v. Hood, 191 F.3d at 1062, citing *United States v. Gaudin* and *Sandstrom v. Montana*, 442 U.S. at 521-243.

> "The prosecution has the burden of proving every element of a crime beyond a reasonable doubt .... Accordingly, when a trial judge omits an element of the offense charged from the jury instructions, it deprives the jury of its fact-finding duty and violates the defendant's due process rights."

United States v. Mendoza, 11 F.3d 126 at 129 (9th Cir. 1993), citing *Carella v. California*, 491 U.S. 263, 265, 109 S.Ct. 2419, 2420, 105 L.Ed.2d 218 (1989).

> "'If a defense negates an element of the crime, rather than mitigates culpability once guilt is proven, it is unconstitutional to put the burden of proof on the defendant.'" ...This is because 'due process requires that the prosecution prove every element of a crime beyond a reasonable doubt.'"

United States v. Hernandez-Franco, 189 F.3d 1151 at 1158 (9th Cir. 1999), quoting *Walker v. Endell*, 850 F.2d 470, 472 (9th Cir. 1987); *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977), and *Mullaney v. Wilbur*.

An absence of imperfect self defense is an element of malice, and the defense of imperfect self defense negates the element of malice. Therefore, by erroneously instructing the jury that voluntary manslaughter required an 'intent to kill, the trial court shifted the burden of proving "imperfect self defense" to petitioner. Thus., the

instruction violated petitioner's right to due process of law.

The Sixth Amendment to the federal Constitution 44 gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." *United States v. Gaudin*, 515 U.S. at 522-523.

iv. The trial court had a *sua sponte* duty to to instruct that imperfect self-defense could negate implied malice, reducing second degree murder to manslaughter.

Under California law, a trial court has a *sua sponte* duty to give correct instructions on the elements of an offense, *People v. Coddington* (2000) 23 Cal.4th 529 at 591, 97 Cal.Rptr.2d 528, 2 P.3d 1081, and to provide correct instructions on lesser included offenses that are supported by evidence substantial enough to merit consideration by the jury, *People v. Coddington, id.* In addition, under California law, "even if the court has no *sua sponte* duty to instruct on a particular legal point, when it does choose to instruct, it must do so correctly." *People v. Castillo* (1997) 16 Cal.4th 1009, 1015, 68 Cal.Rptr.2d 648, 945 P.2d 1197.

The Ninth Circuit has held essentially the same, that the trial court's failure to instruct on an element of the offense is "plain error", even if the defendant did not request a correct instruction. *United States v. Fuchs*, 218 F.3d 957 (9th Cir. 1999).

2. Assuming the trial court did not have a *sua sponte* duty to give a correct voluntary manslaughter instruction, trial counsel was prejudicially ineffective for failing to request such an instruction.

In order to establish ineffective assistance of counsel, petitioner must meet a two prong test. First, "he must establish that 'counsel's representation fell below an objective standard of reasonableness ... under prevailing professional norms.'" Second, he must show that

there was a reasonable probability of a more favorabie result absent counsel's deficiency. (Id. at p. 218.) The requisite "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington* (1984) 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The issue of self defense, imperfect or otherwise, was the major prong of petitioner's case. At the time of petitioner's trial, the California Supreme Court had recognized that imperfect self-defense could negate either express or implied malice. *In re Christian S.* (1994) 7 Cal.4th 768 at 780, fn. 4, 30 Cal.Rptr.2d 33, 872 P.2d 574. The trial court's erroneous limitation of voluntary manslaughter to an intentional killing meant that a showing of imperfect self-defense could not negate a finding of implied malice. Competent counsel would have objected to the erroneous instruction. The only explanation for counsel's failure to object was that he was unaware of the Supreme Court's holding in *Christian S.*

3. The instructional error was not harmless.

A failure to instruct on an essential element of an offense can be harmless error when the omitted element was uncontested and supported by overwhelming evidence. *Neder v. United States, United States v. Gracidas-Ulibarry*, 231 F.3d 1188 (9th Cir. 2000). Otherwise, instructional error cannot be found to be harmless if "a jury delivers a general verdict that may rest either on a legally valid or legally invalid ground ... the verdict may not stand when there is no way to determine its basis." *Keating v. Hood*, 191 F.3d at 1062-1063, citing *Sandstrom v. Montana*, 442 U.S. at 526. See also *Yates v. United States*, 354 U.S. 298,312, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957), *Burks v. United States*, 437 U.S. 15, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); *Stromberg v. California*, 28 U.S. 359, 368, 51 S.Ct. 532, 75 L.Ed. 1117 (1931); *Griffin v. United States*, 502 U.S. 46, 59, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991). The same rule is followed in habeas corpus cases, *Keating, id.*, citing *Suniga v. Bunnell*, 998 F.2d 664, 667,

669-70 (9th Cir. 1993).

No such circumstance applies here. The evidence provided strong support for petitioner's imperfect self-defense theory. The victim, Arroyo, was found with a knife in his hand. Gabriel Lugo, who approached petitioner's car with the victim, indicated that Arroyo was gesturing to the car as a "challenge" and that Arroyo was hot tempered. Petitioner fired the gun only once, and the prosecution's gang expert testified that when gang members drive through the territory of an opposing gang, as was true in the case at trial, the intruders are frequently attacked, often with weapons.

That the jury found petitioner guilty of second degree murder shows that it must have found that he had no intent to kill. Had it jury found intent to kill present, it would have returned a first degree murder verdict.

But the court cannot tell anything further about why the jury returned a second degree murder verdict. The jury might have found imperfect self defense not to apply, and correctly found defendant of second degree murder. On the other hand, the jury might have might have found imperfect self defense applicable, but found petitioner guilty of second degree murder anyway, because the erroneous instruction barred it from finding him guilty of voluntary manslaughter, and because it believed his action did not fall within the narrow definition of involuntary manslaughter given by the court. Petitioner never conceded a lack of imperfect self-defense, and the jury did not necessarily find it absent under any other instructions.

Dated: Oakland, California, ~~Thursday, August 1, 2002~~ SEP 6 2002

Paul McCarthy

Robert J. Beles
Paul McCarthy
Attorneys for Petitioner

APPENDIX A

NOT FOR PUBLICATION

United States Court of Appeals for the Ninth Circuit

ARTEMIO CORTEZ-OCHOA,
Petitioner - Appellant,

v.

CHERYL PILER, Warden, Sacramento State Prison; PEOPLE OF THE STATE OF CALIFORNIA,
Defendants - Appellees.

No. 01-16943 D.C. No. CV-00-04478-CW
MEMORANDUM[2]

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding
Submitted April 9, 2002[3] San Francisco, California
Before: GOODWIN, THOMAS and W. FLETCHER Circuit Judges

Petitioner Artemio Cortez Ochoa ("Petitioner"), a California prisoner, appeals the denial of his 28 U.S.C. § 2254 habeas petition challenging his conviction of second-degree murder with personal use of a firearm. Because the relevant facts are known to the parties, we do not recite them here. Petitioner argues that the state trial court violated his Fourteenth Amendment right to due process and his Sixth Amendment right to trial by jury by presenting inadequate jury instructions. We disagree. Because Petitioner cannot

[2] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

[3] This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

demonstrate that the state court's adjudication of the merits "resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), we affirm.

I

Petitioner contends that the court erred (1) in failing to sua sponte instruct the jury that imperfect self-defense could negate implied malice and (2) in instructing the jury that voluntary manslaughter required a finding of intent to kill. These errors, he argues, prevented the jury from properly considering his theory that imperfect self-defense should result in a conviction of voluntary manslaughter and relieved the prosecution of its burden of proving every element of the charge of second-degree murder.

The trial court did in fact instruct the jury regarding implied malice and imperfect self-defense. It explained and fully defined both express and implied malice and then,, in describing self-defense, indicated that "actual and unreasonable self-defense," or imperfect self-defense, "eliminates any malice, but you can still be found guilty of voluntary or involuntary manslaughter." In its summary of the distinction between murder and manslaughter, the court again described imperfect self-defense and noted that "[iln that case, even if an intent to kill exists, the law is that malice, which is an essential element of murder, is absent." In so doing, it made quite clear that, whatever kind of malice might be found, if imperfect self-defense also was found, the crime would be reduced to manslaughter.

The parties dispute whether *People v. Lasko*, 23 Cal. 4th 10 1 (2000), and *People v. Blakeley*, 23 Cal. 4th 82 (2000), which held that intent to kill is not an element of voluntary manslaughter, represent a change in California law. We need not address that question, as the answer does not impact our conclusion. See *Kleve v. Hill*, 243 F.3d 1149,1151 (9th Cir. 2001). Even if the California Supreme Court's decisions in Lasko and Blakeley changed California

law after Petitioner's trial, a change of law does not invalidate a conviction obtained under an earlier law. Id. If those cases did not change the law, Petitioner was nonetheless properly convicted. As the California Court of Appeal noted on direct appeal in this case, Petitioner had "no cause to complain" about the instruction as given, because the "error" he alleges could only have helped him. The instructions, as given, required the jury to find him guilty of involuntary manslaughter (rather than the voluntary manslaughter verdict that he now argues for) if there was no intent to kill coupled with imperfect self-defense. The district court was correct in holding that the California appellate court "properly concluded that it was not reasonably probable that a result more favorable to Petitioner would have been reached had the trial court instructed the jury differently."

We disagree with Petitioner's assertion that, even with the option of involuntary manslaughter, a jury that found that he acted in imperfect self-defense and lacked an intent to kill was led to convict him of second-degree murder because the trial court's involuntary manslaughter instruction was too "narrow." This argument rests on an assumption that the jury ignored a number of explicit instructions given to it, most notably the instruction that, in the event of doubt as to whether to convict for manslaughter or murder, it must "give the defendant the
benefit of that doubt and find it to be manslaughter."

Even assuming that the state court's instruction was erroneous under California law at the time of trial, Petitioner has not demonstrated that this resulted in a federal constitutional error that was so serious as to be contrary to or an unreasonable application of "clearly established Federal law as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). It is true that due process demands that the jury be instructed correctly as to every essential element of the offense and the burden of proof. See *United States v. Gaudin*, 515 U.S. 506, 522-23 (1995); *Osborne v. Ohio*, 495 U.S. 103, 122-24 (1990). However, as discussed above,

the jury was adequately instructed as to the elements of the offenses. Further, the trial court explicitly instructed the jurors that "[t]o establish that a killing is murder and not manslaughter, the burden is on the People," not only to "prove beyond a reasonable doubt each of the elements of murder," but also to prove by the same standard "that the act which caused the death was not done ... in the actual, even though unreasonable, belief in the necessity to defend against imminent peril to life or great bodily injury [i.e., imperfect self-defense]." The instruction was clear as to the burden of proof borne by the Government, and therefore was not contrary to any clearly established federal law.

II

Finally, P etitioner argues that even if there was no sua sponte duty for the judge to instruct specifically that imperfect self-defense can reduce an implied malice killing to voluntary manslaughter, trial counsel was prejudicially ineffective for failing to request such an instruction. This issue is not included within the Certificate of Appealability granted by the district court. Because Petitioner has not "made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), we decline to expand the COA to cover this issue. See *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Strickland v. Washington*, 466 U.S. 668, 687-94 (1984) (holding a petitioner who claims ineffective assistance of counsel must show both deficient performance and resulting prejudice).

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ARTEMIO CORTEZ OCHOA, *Petitioner,* v. CHERYL PILER, Warden, Sacramento State Prison, *Respondent.*	No. C 00-04478 CW JUDGMENT [filed August 7, 2001]

Pursuant to the Order Denying Petition for Writ of Habeas Corpus, this action is dismissed with prejudice.

IT IS SO ORDERED.

Dated: 8/7/01

CLAUDIA WILKEN
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ARTEMIO CORTEZ OCHOA, *Petitioner,* v. CHERYL PILER, Warden, Sacramento State Prison, *Respondent.*	No. C 00-04478 CW ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS [filed August 7, 2001]

Petitioner Artemio Cortez Ochoa petitions for a writ of habeas corpus under 28 U.S.C. § 2254. Respondent Cheryl Piler, Warden, Sacramento State Prison, opposes the petition. Petitioner argues that the State trial court violated his rights to due process and trial by jury by instructing the jury that voluntary manslaughter required a finding of intent to kill and failing to instruct the jury that imperfect self-defense could negate implied malice, thus preventing A from properly considering Petitioner's theory that imperfect self-defense should result in a conviction of voluntary manslaughter. Further, Petitioner asserts that the trial court's failure to instruct the jury that imperfect self-defense could negate implied malice unconstitutionally relieved the prosecution of its burden of proving every element of the charge of second degree murder. Petitioner also contends that the trial court's instruction on reasonable doubt violated his right to due process by unconstitutionally lowering the prosecution's required burden of proof. Finally, he asserts that defense counsel was ineffective for 1) failing to object to the

instruction that voluntary manslaughter required an intent to kill, 2) failing to request the instruction that imperfect self-defense could negate implied malice and 3) failing to object to the instruction on reasonable doubt. Having considered all of the papers filed by the parties, the Court denies the petition.

BACKGROUND

Petitioner was arrested on February 16, 1996 and was later charged with two counts: 1) murder of Augustine Arroyo in violation of California Penal Code § 187(a), with special allegations of personal use of a firearm in violation of California Penal Code § 12022.5 and infliction of great bodily injury in violation of California Penal Code § 1203.075 and 2) unlawful possession of a firearm in violation of California Penal Code § 12021(e). Petitioner pleaded no contest to count two and the great bodily injury allegation was stricken from count one.

A jury trial was held with respect to count one at which the following evidence was presented. On the afternoon of October 6, 1995, Juan Barrera was driving a white Pontiac Grand Prix on East 14th Street in Oakland. His brother, Rafael Barrera, a member of the Border Brothers gang, was in the front passenger seat. While the Grand Prix was stopped at a light, a member of the opposing Nortenos gang approached the driver's side window, punched Juan in
the face and ducked into a waiting Cadillac which drove away. Petitioner, who had been standing nearby, ran over to the Grand Prix and got in the car. Petitioner was a member of the Border Brothers gang and knew Juan and Rafael Barrera.

The three youths pursued the Nortenos, Cadillac but eventually lost sight of the car. They decided to find some friends associated with the Border Brothers. Petitioner had, or picked up, two guns. The Grand Prix picked up two other Border Brothers members. A beige Chevrolet, filled with approximately five more

Border Brothers, joined the Grand Prix and both vehicles set out in search of the Nortenos, Cadillac.

After approximately an hour of searching, the Chevrolet and the Grand Prix headed onto 37th Avenue and encountered a group of Norteno youths. The individuals in the vehicles yelled gang insults at the youths and the beige Chevrolet turned around. The Norteno youths ran toward a nearby BART station for safety. The white Grand Prix, driven by Juan Barrera with Petitioner sitting in the front passenger seat, also turned around and followed the Chevrolet.

Five other Nortenos, including fourteen year-old Augustine Arroyo and sixteen year-old Gabriel Lugo, witnessed these events from a nearby house. Arroyo and Lugo entered the street to see what was happening. The individuals in the Grand Prix yelled gang insults at them. As the Grand Prix passed by, Arroyo approached within eighteen feet of the car, threw up his hands and said "What's up." At that point, Petitioner pulled out his gun and fired a single shot out the car window. The bullet struck Arroyo in the cheek and continued into his brain, killing him. Police found a small, closed pocket knife in Arroyo's hand. Lugo was about four or five feet away from Arroyo when the shot was fired. Juan and Rafael Barrera testified that Petitioner had fired the shot back toward the two youths as the car moved away.

Initially, Petitioner denied any involvement in the shooting, claiming that he was with his girlfriend at the time it occurred. At first, the girlfriend corroborated his story, but she later admitted lying to the investigating officer regarding Petitioner's whereabouts and stated that Petitioner had told her of his role in Arroyo's death. Petitioner eventually admitted to firing the shot that killed Arroyo but claimed that he had not known Arroyo was there. Instead, Petitioner asserted that he was shooting at another individual who was approaching the car and with whom he had been involved in a fight a few months earlier. Petitioner did not see any weapons in this person's hands, but claimed that he thought he saw the person

reaching inside his pocket.

At the close of evidence, the court instructed the jury, in relevant part, as follows:

> Malice
> Malice may be either express or implied.
> Malice is express when there is manifested an intention unlawfully to kill a human being.
> Malice is implied --
> Implied malice only applies to second-degree murder.
> Malice is implied when the killing resulted from an intentional act; the natural consequences of the act are dangerous to human life; and three, the act was deliberately performed with knowledge of the danger to and with conscious disregard for human life.

(Reporter's Transcript, hereinafter R.T., 718.)

> First-Degree Murder
> All murder which is perpetrated by any kind of willful, deliberate, and premeditated killing with express malice aforethought -- an intent to kill, aforethought -- is murder of the first degree.

(R.T. 719.)

> Second-Degree Murder
> Murder of the second degree is the unlawful killing of a human being -- still with malice aforethought -- when the perpetrator intended unlawfully to kill a human being but the evidence is insufficient to prove deliberation and premeditation.
> So, for second-degree murder, you could have an intent to kill, but what's missing is premeditation and

deliberation.

Murder of the second degree is also the unlawful killing of a human being when: the killing resulted from an intentional act; the natural consequences of the act are dangerous to human life; and the act was deliberately performed with knowledge of the danger to and with conscious disregard for human life . . .

So, even though you didn't intend to kill anybody, the law is going to imply malice, that what you did was so bad, we are going to imply malice even though you didn't intend to kill anybody.

Okay?

So, that's the difference between express malice, which is an intent to kill, and implied malice as I have just explained it to you.

(R.T. 721-22.)

Voluntary Manslaughter

Every person who unlawfully kills another human being without malice aforethought but with an intent to kill is guilty of voluntary manslaughter in violation of Penal Code § 192(a).

There is no malice aforethought if the killing occurred upon a sudden quarrel or heat of passion or in the actual but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury.

That's called an imperfect self-defense, andI'll explain that to you later on.

In order to prove this crime, each of the following elements must be proved: one, a human being was killed; Two, the killing was unlawful; and Three, the killing was done with the intent to kill.

A killing is unlawful if it was not justifiable.

(R.T. 724-25.)

Involuntary Manslaughter

With involuntary manslaughter, there is no intent to kill. No intent to kill for involuntary manslaughter.

Every person who unlawfully kills a human being without malice aforethought and without an intent to kill is guilty of the crime of involuntary manslaughter in violation of Penal Code § 192(b).

A killing is-unlawful within the meaning of this instruction if it occurred: One, during the commission of an unlawful -- unlawful act not amounting to a felony which is dangerous to human life under the circumstances of its commission.

An unlawful act not amounting to a felony consists of a violation of Penal Code § 417, which I will define shortly.

The commission of an unlawful act, without due caution and circumspection, would necessarily be an act that was dangerous to human life in its commission.

In order to prove this crime, each of the following elements must be proved: One, a human being was killed; and; Two the killing was unlawful.

(R.T. 727-28.)

Self-Defense

There are two kinds of self-defense. There's one called actual and reasonable which I'll define.

Actual and reasonable is a complete defense. Actual and reasonable defense equals justifiable homicide,

which is not an unlawful killing, okay, but the self-defense has to be actual and reasonable.

Then, remember I said -- I referred to what is known as imperfect self-defense when I was defining voluntary manslaughter? Remember that?

That's called actual but unreasonable. one is actual and reasonable. This one is actual but unreasonable.

If you have actual and unreasonable selfdefense, that would -- that eliminates any malice, but you can still be found guilty of voluntary or involuntary manslaughter.

Okay?

The first one wipes the slate clean.

The second one, if you find that to be the case, prevents conviction of murder. But you could still find somebody guilty of either voluntary or involuntary manslaughter if you find that there was an actual but unreasonable self-defense . . .

Now, I'm going to read to you imperfect selfdefense as it's called in the law.

A person who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury kills unlawfully but does not harbor malice aforethought and is not guilty of murder. This is so even though a reasonable person in the same situation, seeing and knowing the same facts, would not have had the same belief. Such an actual but unreasonable belief is not a defense to the crime of voluntary or involuntary manslaughter.

(R.T. 730-32.)

Murder versus Manslaughter

> So the distinction between murder and manslaughter is that murder requires malice while manslaughter does not.
> When the act causing the death, though unlawful is done . . . in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, the offense is manslaughter. In that case, even if an intent to kill exists, the law is that malice, which is an essential element of murder, is absent.
> To establish that a killing is murder and not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done . . . in the actual, even though unreasonable, belief in the necessity to defend against imminent peril to life or great bodily injury.

(R.T. 734.)

On February 6, 1998, the jury found Petitioner guilty of second-degree murder and found the firearm use allegation to be true. Petitioner is now serving a sentence of twenty-five years to life at the California State Prison in Sacramento. On March 26, 1998, Petitioner appealed his conviction to the California court of appeal which affirmed the conviction on September 17, 1999. Petitioner then timely filed a petition for review with the California Supreme Court which denied review on December 1, 1999. 8

In the State appellate proceedings, Petitioner has exhausted the issues raised in the current petition.

LEGAL STANDARD

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA), which governs review of a State

prisoners application for a writ of habeas corpus raising claims adjudicated on the merits in State court. The applicable standard of review appears in 28 U.S.C. S 2254(d): a district court may not grant a State prisoner's petition for a writ of habeas corpus with respect to claims adjudicated on the merits in State court unless the disposition of the claims

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

In addition, habeas relief is warranted only if the constitutional error at issue, in light of the record as a whole, had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson* 507 U.S. 619, 623 (1993) (citing *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)); *DePetris v. Kuykendall*, 239 F.3d 1057, 1061 (9th Cir. 2001); *Bains v. Cambra*, 204 F.3d 964, 977-78 (9th Cir 2000).

The statutory language "clearly established federal law" refers to "the holdings, as opposed to the dicta, of (the Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000)." Section 2254(d)(1) restricts the source of clearly established law to [the Supreme] Court's jurisprudence." Id. Although a State court decision may no longer be overturned on habeas review merely because of a conflict with circuit-based law, circuit decisions may still be important as persuasive authority in determining whether a particular State court holding is an "unreasonable application" of Supreme Court precedent or in assessing what law is "clearly established." *Van Tran v. Lindsey*, 212 F.3d 1143, 1154 (9th Cir.

2000); *Duhaime v. Ducharme*, 200 F.3d 597, 600 (9th Cir. 2000).

Under the "contrary to" clause of 28 U.S.C. § 2254(d), a federal court may grant a State prisoner's petition for habeas corpus if the State court "arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the State court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 412. Under the "unreasonable application" clause of the statute, a federal court may grant a State prisoner's petition if the State court "identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." A federal court may not grant the petition merely because it independently decides that the State court "applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." at 411.

Furthermore, when addressing the "unreasonable application" of federal law prong of § 2254(d)(1), the Ninth Circuit has applied the "clear error" doctrine used to evaluate federal mandamus petitions. *Van Tran*, 212 F.3d at 1152-53. Pursuant to this doctrine, a federal court must reverse a State court decision as an "unreasonable application of clearly established Federal law" when, after independent review, the court is left with a "definite and firm conviction" that an error was committed.[4] Id. To determine whether a State court's decision is "contrary to" or involved an "unreasonable application of clearly established Federal law," a federal court must look to the decision of the highest State court to

---

[4] 'The *Van Tran* court emphasized that granting a State prisoner's habeas petition should not be as rare as granting mandamus petitions. The court also explained that the clear error doctrine most nearly reflected the degree of respect for other courts' judgments that Congress and the Supreme Court felt was required in habeas cases. See *Van Tran*, 212 F.3d at 1153.

address the merits of a particular case. *LaJoie v. Thompson*, 217 F.3d 663, 669 n.7 (9th Cir. 2000). If the State court only relied on State law, the federal court must examine whether the State law, as interpreted by the State court, is "contrary to" governing federal law. See *Lockhart v. Terhune*, 250 F.3d 1223, 1229 (9th Cir. 2001). If the State court properly identified the governing federal law, the federal court must examine whether the State court unreasonably applied it to the facts of the case. See AL, when the State court does not provide a rationale for its decision, federal review is not ja novo, but an independent evaluation of the record is required to decide whether the State court clearly erred in its application of governing federal law. *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000).

DISCUSSION

I. Voluntary Manslaughter and Implied Malice Instructions

Petitioner contends that the State trial court violated his Fourteenth Amendment right to due process and his Sixth Amendment right to trial by jury by instructing the jury that voluntary
manslaughter required a finding of intent to kill and by failing to instruct the jury specifically that imperfect self-defense could negate implied malice, thereby reducing second-degree murder to voluntary manslaughter. According to Petitioner, if the jury believed he had killed Arroyo unintentionally but with the actual but unreasonable belief that he needed to defend himself, the trial (court's instructions prevented it from considering his theory of imperfect self-defense to arrive at a verdict of voluntary manslaughter.

Section 187(a) of the California Penal Code defines murder as the "unlawful killing of a human being, or a fetus, with malice aforethought." Under der California law, malice may be express, as when the defendant manifests "a deliberate intention unlawfully to take away the life of a fellow creature" or implied, as "when no

considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." Cal. Penal Code § 188. Section 189 defines first-degree murder, in. relevant part, as a "willful, deliberate and premeditated killing." "Second degree murder is the unlawful killing of a human being with malice, but without the additional elements (i.e., willfulness, premeditation, and deliberation) that would support a conviction of first degree murder." *People v. Tabios*, 67 Call App. 4th 1, 7 12 (1998). Manslaughter is "the unlawful killing of a human being without malice." Cal. Penal Code S 192. Section 192 states that a defendant lacks malice when acting in the "heat of passion." Moreover, a defendant who intentionally kills in unreasonable self-defense also lacks malice and is guilty of voluntary manslaughter, but not murder. *People v. Barton*, 12 Cal. 4th 18? 199 (1995). Involuntary manslaughter is defined as the commission of an act, involving conduct that so departs from the conduct of a reasonably prudent person as to show no proper regard for human life, that creates a substantial degree of risk of death or serious bodily injury. *People v. Cleaves*, 229 Cal. App. 3d 367, 378 (1991). At the time of Plaintiff's trial, the California Supreme Court had not addressed what offense is committed when a defendant, acting with conscious disregard for life, unintentionally kills a human being in unreasonable self-defense. See *People v. Lasko*, 23 Cal. 4th 101, 107 (2000); *People v. Blakeley*, 23 Cal. 4th 82, 89 (2000).

In both *Lasko* and *Blakeley*, the court rejected the notion that intent to kill was a requisite element of voluntary manslaughter. Furthermore, in *Blakeley*, the court concluded that "when a defendant, acting with conscious disregard for life, unintentionally kills in unreasonable self-defense, the killing is voluntary, not involuntary, manslaughter." *Blakeley*, 23 Cal. 4th at 88-89. Prior to the *Blakeley* decision, a jury that found a defendant lacked an intent to kill, but had an actual but unreasonable belief in the need to defend himself, could have returned a verdict of involuntary manslaughter. See id, at 90. *Blakeley*, however, expanded the amber

of voluntary manslaughter so that a defendant with that state of mind could be convicted of voluntary manslaughter. See Id. at 91. Recognizing this, the California Supreme Court stated that its decision was "an unforeseeable judicial enlargement of the crime of voluntary manslaughter and thus [could] not be applied retroactively Id, at 92.

Relying on pre-*Blakeley* California law, the trial court here instructed the jury that voluntary manslaughter required an intent to kill. It did not specifically instruct that imperfect selfdefense negated implied malice as well as actual malice. However, under its instructions, the jury could have returned only an involuntary manslaughter verdict if it found Petitioner acted in imperfect self-defense but lacked an intent to kill. Thus, Petitioner was not prejudiced by the trial court's instructions.

The California court of appeal, in its analysis of the trial court's instructions as a whole, applied California law as it existed at the time of the trial and the appeal, and affirmed the second-degree murder verdict. Because the appellate court applied State law, this Court must examine whether the State law, as interpreted by the State court, is "contrary to" or an "unreasonable application" of governing federal law. See *Lockhart v. Terhune*, 250 F.3d at 1229. the Court concludes it is neither.

The appellate court reasoned,

> Looking at the instructions as a whole, reasonable jurors could only have understood the instructions to mean that if appellant shot without an intent to kill, but in the unreasonable belief of the need to defend himself, he could be convicted only of involuntary manslaughter. Thus, the omission
>
> of an instruction that specifically stated that imperfect self-defense negates implied malice could not have prejudiced appellant. On the contrary, because the

> instructions, as given, required the jury to find appellant guilty of involuntary manslaughter -- rather than the voluntary manslaughter verdict argued for by appellant -- if there was no intent to kill coupled with imperfect self-defense, he has no cause to complain.

People v. Ochoa, No. A082288, slip op. at 6-7 (Cal. App. 1st Dist. Sept. 17, 1999). The court properly concluded that it was not reasonably probable that a result more favorable to Petitioner would have been reached had the trial court instructed the jury differently.

Petitioner makes two arguments disputing this conclusion. First, he contends that the trial court's involuntary manslaughter instruction was too narrow to allow the jury to convict him of that offense, but he does not explain what was too narrow, or incorrect, in that instruction. He argues that if the jury found that he acted with unreasonable self-defense but did not have an intent to kill, it would have had to find him guilty of second-degree murder. The Court disagrees. The trial court instructed three times that a person who kills in the actual but unreasonable belief in the need to defend himself does not harbor malice aforethought and is not guilty pf murder. It also repeated twice that actual but unreasonable self-defense eliminates any malice but allows a conviction of voluntary or involuntary manslaughter. (R.T. 730-34.) And, the court instructed that every person who unlawfully kills without malice aforethought and without an intent to kill is guilty of the crime of involuntary manslaughter, (R.T. 727.)

These instructions, taken as a whole, clearly informed the jury that, if it found that Petitioner had an actual but unreasonable belief that he had to defend himself but had no intent to kill, it could not return a verdict of first or second-degree murder, or even voluntary manslaughter, but could return a verdict of involuntary manslaughter.

Secondly, Petitioner asserts that, because the jury returned a second-degree murder verdict, it must have found that he had no intent to kill because, otherwise, it would have returned a firstdegree murder verdict. According to Petitioner, the jury could have returned a second-degree murder verdict improperly, based on a finding of imperfect self-defense combined with implied malice but no intent to kill. Again, the Court disagrees.

First-degree murder, as the State trial court instructed, not only required intent to kill but also required willfulness, deliberation and premeditation. The trial court instructed that "for second-degree murder, you could have an intent to kill, but what's missing is premeditation and deliberation." (R.T. 721.) The record does not support a finding of premeditation, because there is no evidence that Petitioner had deliberately planned to kill anyone. Rather, the facts suggest that the shooting occurred quite suddenly, without premeditation. Therefore, the jury could have found that Petitioner had an intent to kill without returning a conviction of first-degree murder.

The trial court also instructed that voluntary manslaughter required an intent to kill, but that involuntary manslaughter did not. (R.T. 724, 727.) Thus, under the court's instructions, whether or not the jury found Petitioner had an intent to kill, if it had found that he had not premeditated the killing and had not acted in actual but unreasonable self-defense, it could have convicted him of second-degree murder. If it had found intent to kill and actual but unreasonable self-defense, it could have convicted him of voluntary manslaughter. If the jury had found that Petitioner did not have an intent to kill but acted in actual but unreasonable self-defense, it could have convicted him of involuntary manslaughter. Each of the above serves as a proper legal basis for the jury's decision. Because the trial court instructed that a finding of imperfect self-defense negated malice and did not support a conviction of murder, the jury could not have based its murder conviction on the improper theory suggested by Petitioner.

Based on the foregoing analysis, the California court of appeal's decision, that the trial court's instruction that voluntary manslaughter required a finding of intent to kill and its failure to instruct specifically that imperfect self-defense negated implied malice did not prejudice Petitioner, does not involve a contrary or unreasonable application of law as explicated by the United States Supreme Court.

II. Prosecution's Burden to Prove Every Element of Second-Degree Murder

Petitioner contends that the trial court's failure to instruct the jury that imperfect self-defense could negate the implied malice element of second-degree murder relieved the prosecution of its burden of proving every element of the second-degree murder charge.

The California court of appeal did not address this-argument when it concluded that Defendant had not been prejudiced by the trial court's failure to give the above instruction. Therefore, this Court must undertake an independent evaluation of the record to determine whether the appellate court clearly 6 erred in applying governing federal law. See *Delgado*, 223 F.3d at 982.

"The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense." *Carella v. California*, 491 U.S. 263, 26S (1989). Jury instructions that relieve this burden violate a defendant's right to due process by undermining the presumption of innocence and invading the truth- I finding task assigned to juries. id.

Here, the State trial court instructed the jury on imperfect self-defense as follows:

> Then, remember I said -- I referred to what is known as imperfect self-defense when I was defining

> voluntary manslaughter? . . .
> That's called actual but unreasonable. one is actual and reasonable. This one is actual but unreasonable.
> if you have actual and unreasonable selfdefense, that would -- that eliminates any malice, but you can still be found guilty of voluntary or involuntary manslaughter.
> The first one wipes the slate clean.
> The second one, if you find that to be the case, prevents conviction of murder. But you could still find somebody guilty of either voluntary or involuntary manslaughter if you find that there was an actual but unreasonable self-defense . . .

(R.T. 730-32.) The court also instructed the jury on the prosecution's burden of proof as follows:

> To establish that a killing is murder and not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done . . . in the actual, even though unreasonable, belief in the necessity to defend against imminent peril to life or great bodily injury.

(R.T. 734.)

By informing the jury that it could not return a murder verdict if it found imperfect self-defense and stating that the burden was on the People to prove beyond a reasonable doubt each of the elements of murder as well as that the killing was not done in the actual but unreasonable belief in the need to use selfdefense, the State trial court placed the burden of disproving imperfect self-defense on the prosecution. Therefore, the jury was required to make a determination on all the elements of seconddegree murder.

The trial court did not commit an instructional error.

Consequently, the California court of appeal's decision that Petitioner was not prejudiced by the State trial court's failure expressly to instruct the jury that imperfect self-defense could negate implied malice is neither contrary to nor an unreasonable application of controlling federal authority. Petitioner's second claim fails.

III. Unconstitutionality of Instruction on Reasonable Doubt

Petitioner contends that the trial court's instruction on reasonable doubt was unconstitutional. The court relied on revised California Jury Instruction (CALJIC) No. 2.90 when it defined reasonable doubt as "that state of the case which, after-the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge." (R.T. 710.) Petitioner asserts that the term "abiding conviction" alone merely means that the jury must have a continuing strong belief in a defendant's guilt and that this standard unconstitutionally brings the level of proof below that required to sustain a conviction.

While the "beyond a reasonable doubt" standard is a requirement of due process, the Constitution neither prohibits trial courts from defining reasonable doubt nor dictates that they do so as a general rule. See *Victor v. Nebraska*, 511 U.S. 1, 6 (1994). A trial court must instruct a jury on the necessity of finding that the government has proven a defendant's guilt beyond a reasonable doubt, but the Constitution does not mandate that the court use certain words in advising a jury on the government's burden. See *Id.* Taken as a whole, the instructions must correctly convey to a jury the general concept of reasonable doubt. See (citing *Holland v. United States*, 348 U.S. 121, 140 (1954)).

California's previous instruction on reasonable doubt read as follows:

> It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of-the truth of the charge.

CALJIC No; 2.90 (5th ed. 1988). In *Victor*, the United States Supreme Court rejected a challenge to the instruction and affirmed the judgment of the California Supreme Court which recognized the constitutionality of the instruction. *Victor*, 511 U.S. at 6. However, the Court noted that the phrase "moral certainty" might not be recognized by jurors as a synonym for "beyond a reasonable doubt," stating that "an instruction cast in terms of an abiding conviction as to guilt, without reference to moral certainty, correctly states the government's burden of proof." Id. at 14-15.

Based on *Victor*, the California Supreme Court declared in *People v. Freeman*, 8 Cal. 4th 450, 504 (1994), that "trial courts might, in the future, safely delete the following phrases in the standard instruction: land depending on moral evidence' and 'to a moral certainty.'" Following Freeman, CALJIC No. 2.90 was revised to heed the California Supreme Court's suggestion. Five years "later, in *Lisenbee v. Henry*, 166 F.3d 997, 999-1000 (9th Cir. 1999), the Ninth Circuit rejected a constitutional challenge to the revised instruction, relying on the Supreme Court's rationale in *Victor* that use of the term "abiding conviction" to define reasonable doubt is constitutionally sound.

In the case at bar, the trial court's instruction on reasonable doubt, see R.T. 710, mirrored revised CALJIC No. 2.90, which has already been approved by the Ninth Circuit in *Lisenbee*. (gee R.T. 710.) Based on the foregoing analysis, the appellate court's decision

that the trial court's reasonable doubt instruction satisfied due process concerns was neither contrary to nor an unreasonable application of controlling federal law. Thus, Petitioner's third claim fails.

IV. Ineffective Assistance of Counsel

Petitioner asserts that, even if the State trial court did not have a sua sponte duty to 1) instruct the jury that voluntary manslaughter did not require a finding of intent to kill, 2) instruct the jury that imperfect self-defense could reduce an implied-malice killing to voluntary manslaughter or 3) provide a different instruction to the jury regarding reasonable doubt, defense counsel should have requested these instructions and his failure to do so rendered him ineffective in violation of the Sixth Amendment to the Constitution.

In order to prove ineffective assistance of counsel, Petitioner "must establish deficient performance and prejudice." *Lowry v. Lewis*, 21 F.3d 344, 346 (9th Cir. 1994) (citing *Strickland v. Washington*, 466 U.S. 668, 688-93 (1984)). In Strickland, the Supreme Court stated that there is no reason for a court in deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged .deficiencies. Strickland, 466 U.S. at 697. The California court of appeal concluded that because Petitioner was unable to prove that he was prejudiced by the trial court's instructions regarding seconddegree murder, voluntary manslaughter and imperfect self-defense.

Petitioner's claim of ineffectiveness of counsel also failed. *Eg. People v. Ochoa*, No. A082288, slip op. at 7. Further, as previously discussed, the court of appeal decided that the trial court's

instruction on reasonable doubt satisfied due process concerns. Egg id. at 9. In so concluding, the court of appeal correctly applied the standard for ineffective assistance of counsel explained in Strickland. Therefore, the California court of appeal's decisions are not contrary to nor an unreasonable application of clearly established federal law. Petitioner's fourth claim fails.

CONCLUSION

For the foregoing reasons, Petitioner's petition for a writ of *habeas corpus* is denied.

CLAUDIA WILKEN
United States District Judge

Copies mailed as noted
Dated: 7 2001
mailed to counsel on the following page